Supreme Court, U.S.
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No. 09-657

IN THE

Supreme Court of the United States

BIRMINGHAM BOARD OF EDUCATION,

Petitioner,

v.

CATHY McCORD-BAUGH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

REPLY BRIEF

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ARGUMENT

Respondent Cathy McCord Baugh's ("Baugh/Respondent") brief in opposition confirms the need for review by this Court. First, Respondent argues that the Birmingham Board of Education ("Board") failed to properly preserve the issue that is raised in its petition for certiorari. Secondly, Respondent argues that even if the issue had been properly preserved, the issue is too complex and thus, this Court should not tackle it. Respondent's argument that no court has addressed what she considers to be a "complex" issue, is the very reason that the United States Supreme Court should grant the Board's petition for certiorari and resolve the issue now.

I. RESPONDENT'S BRIEF CONFIRMS THAT THIS COURT SHOULD ADDRESS THE APPLICABILITY AND EFFECT OF *ENGQUIST* IN THE INSTANT CASE

The Board is clear that the instant case is analogous to *Engquist v. Oregon Department of Agriculture*, 128 S.Ct. 2146 (2008); and thus, Baugh's equal protection class-of-one claim cannot stand against a public entity such as the Board. However, Baugh herself seems to find the holding in *Engquist* to be ambiguous or more complex than that. Baugh argues that *Engquist* may not abolish all equal protection class-of-one claims against public entities. Brief in Opposition at pgs. 9-10. Baugh further questions whether some equal protection class-of-one claims, such as those brought in the instant case, may be an exception to the holding in *Engquist*. Brief in Opposition at pgs. 9-10.

The Board's position is clear. Baugh, just as the plaintiff in *Engquist*, brought an equal protection class-of-one claim against a public entity. *Engquist* holds that "the class-of-one theory of equal protection has no application in the

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public employment context." *Engquist* at 2156. However, Baugh argues that *Engquist* should be read as barring "class of one" claims only for certain types of employment decision-making, those in which subjectivity and individualized judgment are inherent. Brief in Opposition at page 10.

Clearly, if this Court intended to differentiate or to make exceptions to its holding in *Engquist*, it would have done so in that decision. Moreover, the Board finds no distinction between the decision-making process in the instant case and such process in *Engquist*. Nevertheless, Baugh's argument that such an analysis is necessary to determine the issue at hand, is one reason that this Court should grant the Board's petition.

II. THE ISSUE RAISED IN THIS APPEAL WAS PRESERVED AND CONSIDERED BY THE ALABAMA SUPREME COURT

Baugh argues that the Alabama Supreme Court did not decide the *Engquist* issue, which is the subject of this petition. However, after granting the Board's petition for writ of certiorari, on December 18, 2008, the Alabama Supreme Court issued an Order specifically directing the parties to simultaneously file briefs "addressing the applicability and effect of the decision in *Engquist v. Oregon Department of Agriculture*." See petition at App. 37a. In accordance with that Order, both parties submitted briefs regarding the applicability of *Engquist* on January 20, 2009. Thereafter, on September 30, 2009, the Alabama Supreme Court issued a decision quashing the writ previously granted, and in essence upholding the judgment against the Board on Baugh's equal protection "class-of-one" claim. See petition at App. 36a.

Moreover, Baugh's contention that the Board did not properly preserve the issue that it now raises in its petition is flawed. Baugh mistakenly argues that the Board is barred from relying on the United States Supreme Court decision in *Engquist*, holding that the " 'class-of–one' theory of equal protection has no place in the public employment context." In support of this contention, Baugh maintains that the Board failed to argue that there could be no "class of one" claim in the employment context in the trial court and in the intermediate appellate court. See Brief in Opposition at pg. 7.

However, the only claim that remained alive throughout this case is Baugh's Section 1983 equal protection "class-of-one" claim. This is the only claim that was at issue during the trial.[1] After the trial court entered a verdict/judgment in favor of Baugh, the Board filed an appeal with the Alabama Court of Civil Appeals. The only claim that still remained at that time was Baugh's Section 1983 equal protection "class-of-one" claim. Accordingly, after the Alabama Court of Civil Appeals affirmed the trial court's verdict/judgment, the Board petitioned the Alabama Supreme Court for a writ of certiorari based on that one remaining claim.

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[1] Baugh's case was originally brought pursuant to two claims, i.e., a breach of contract claim and a Section 1983 equal protection "class-of-one" claim. Both claims were initially disposed of at summary judgment. Baugh then appealed to the Alabama Court of Civil Appeals, which affirmed the trial court's grant of summary judgment. Thereafter, Baugh appealed to the Alabama Supreme Court, who affirmed the lower courts' holdings regarding Baugh's breach of contract claim, but held that Baugh could bring an equal protection "class-of-one" claim against the Board. Accordingly, after the individual defendants were dismissed under the doctrine of qualified immunity, Baugh's equal protection "class-of-one" claim was tried before a jury.

Therefore, the only claim that is currently pending against the Board is Baugh's Section 1983 equal protection "class-of-one" claim, which is the exact claim that this Court held cannot be brought against a public entity such as the Birmingham Board of Education, in *Engquist.*

Baugh argues that the Board could have or should have argued that Baugh could not bring an equal protection class-of-one claim in the lower courts. However, there was clearly no reason for the Board to make such an argument at that juncture, when this Court's ruling in *Village of Willowbrook v. Olceh*, 528 U.S. 562 (2000) held that such claims could be brought. Any such argument by the Board in the trial court or in the Alabama Court of Civil Appeals would have been futile. It has long been established that decisions of the United States Supreme Court interpreting federal law are binding upon both federal and state lower courts. See *Henry et al., v. City of Rock Hill*, 376 U.S. 776,777 (1964) (holding that a rule stated in a decision by the Supreme Court of the United States and based upon the Federal Constitution is, under the supremacy clause, binding upon state courts as well as upon federal courts); *A.L. Lockhart v. Fretwell*, 506 U.S. 364,376 (1993) (THOMAS, concurring) (acknowledging that a state court is bound by the U.S. Supreme Court's interpretation of federal law, but is not bound by the interpretation of a federal court of appeals). Thus, the Board had no viable reason to make such an argument prior to this Court's decision in *Engquist* which distinguished *Olech* and held that "the class-of-one theory of equal protection has no application in the public employment context."[2] *Engquist* at 2156.

[2] While it is true that in 2007, the Ninth Circuit Court of Appeals reversed the jury verdict in *Engquist v. Or. Dept. of* (Cont'd)

CONCLUSION

It is the Board's position that the law is clear as it relates to the issue presented in the instant case. Baugh, just as the plaintiff in *Engquist*, brought an equal protection class-of-one claim against a public entity. *Engquist* holds that "the class-of-one theory of equal protection has no application in the public employment context." *Engquist* at 2156. Thus, this Court should grant the petition for certiorari and summarily reverse the holding of the Alabama Supreme Court. However, if this Court is inclined to consider respondent Baugh's unique and novel argument regarding a possible interpretation of the *Engquist* decision, the instant case is the perfect opportunity for this Court to do so. Accordingly, the petition for a writ of certiorari should be granted.

(Cont'd)
Agriculture, 478 F.3d 985 (9th Cir. Or. 2007), and held that "[t]he class-of-one theory of equal protection does not apply in the public employment context, no such precedent existed in Alabama nor in the Eleventh Circuit at that time. Thus, the Board had no reason to rely on that decision. See *United States v. Major*, 303 Fed. Appx. 798, 802 (11th Cir. 2008), (stating that opinions from other circuits do not constitute binding precedent); *Fanin v. VA*, 572 F.3d 868, 874 (11th Cir. 2009), (stating that "any number of assaults from other circuits cannot overrun one binding precedent from our own circuit"); Passmore *Swann v. Health Partners Inc.*, 388 F.3d 834,837, (finding that "[i]n this circuit, only the court of appeals sitting en banc, an overriding United States Supreme Court decision, or a change in the statutory law can overrule a previous panel decision.").

In fact, from the beginning of this case the Board argued that Baugh could not bring an equal protection class of one claim in this matter. However, the Alabama Supreme Court, following *Olech*, held that such a claim could be brought by Baugh. Clearly, the decision of the Alabama Supreme Court relying on *Olech*, which was the law of the land at that time, was the binding precedent on this issue.

Respectfully submitted,

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